***United States Court of Appeals***

***for the Second Circuit***

# APPELLANT'S REPLY BRIEF

# 77-7175

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P/S

# United States Court of Appeals

**For the Second Circuit**

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G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

*Plaintiffs-Appellants,*

*against*

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. McKEON, SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, INC., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

*Defendants-Appellees.*

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**On Appeal from the United States District Court for the Eastern District of New York**

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## REPLY BRIEF FOR APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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G. THOMAS CESTARO, CATHERINE CESTARO, RICHARD MARCHETTI and STA-BRITE AUTO PAINTING CORP.,

Plaintiffs-Appellants,

DOCKET NO. 77-7175

- against -

THOMAS J. MACKELL, JAMES D. ROBERTSON, FREDERICK J. LUDWIG, JOSEPH N. MONTY, DAVID J. McKEON, SALVATORE GIUFFREDA, JOHN SAVAGE, BERNARD NELSON, CHARLES NAPOLITANO, STUART B. STILLMAN, AVIS RENT-A-CAR SYSTEM, INC., and INTERNATIONAL TELEPHONE & TELEGRAPH CORPORATION,

Defendants-Appellees.

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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

In their briefs the Avis and the Mackell defendants-appellees assert a number of arguments which, however superficially attractive they have been made to appear, do not withstand detailed analysis and do not provide a basis for affirming the district court's decision below.*

## I. THIS ACTION IS TIMELY BROUGHT

Defendants press three major arguments in support of the decision below dismissing the complaint as time-barred.

* A substantially edited version of the decision below is reported at 429 F. Supp. 465 (E.D.N.Y. 1977).

Defendants assert (1) that the concealment doctrine does not apply because plaintiffs have not adequately alleged that defendants concealed their conspiracy and (2) that plaintiffs did not act with diligence in attempting to uncover the plot against them. If the concealment doctrine does apply, defendants argue (3) that the court below properly interpreted federal and state law in applying New York's two-year from discovery rule. These contentions are without merit.

A. The Concealment Doctrine Does Apply To This Action.

Defendants' arguments concerning the applicability of the concealment doctrine contain a number of errors.

> --Contrary to defendants' argument, it is not necessary for plaintiffs to allege affirmative acts of concealment by defendants for the doctrine to apply. Plaintiffs' allegations that the conspiracy was inherently secret and self-concealing are sufficient to toll the limitations period;
>
> --Plaintiffs acted with diligence to uncover the conspiracy but were unable to do so without subpoena power. Defendants' suggestion that plaintiffs should have started a lawsuit and used the discovery process to learn the necessary facts ignores the fact that until the existence of the conspiracy was revealed, plaintiffs could not have commenced a civil rights action in the court below that would have survived a motion to dismiss.

1. Defendants Concealed Their Conspiracy.

To invoke the federal concealment doctrine, it is not necessary to allege that defendants committed affirmative

acts of concealment. The question is not how defendants concealed their conspiracy but whether it was in fact concealed from plaintiffs.

Such is the teaching of the Seventh Circuit in Baker v. F & F Investment, 420 F. 2d 1191 (7th Cir.), cert. denied sub nom. Universal Builders, Inc. v. Clark, 400 U.S. 821 (1970), a case defendants cite for the opposite position. The Baker court stated:

> "Where courts have tolled limitations periods because of the existence of a conspiracy, the basis for the action has been the inherently secret nature of the conspiracy involved and its necessity as an element in the cause of action." 420 F. 2d at 1198-99.

Although the Court held that the plaintiffs' allegations in that case did not demonstrate concealment, the Court did not reject the notion that an inherently self-concealing conspiracy does not come within the purview of the concealment doctrine.

Indeed no case cited by either defendants or plaintiffs stands for the proposition that plaintiffs must allege affirmative acts of concealment and that a self-concealing conspiracy does not fall within the concealment doctrine.

Such a distinction is entirely irrational and inconsistent with the purpose of the concealment doctrine. The only relevant inquiry in a concealment case is whether defendants' conspiracy was concealed and whether plaintiffs were ignorant of it through no fault of their own. City of Detroit v. Grinnell

Corp., 495 F. 2d 448, 460, (2d. Cir. 1974). The manner of concealment is not of primary importance.

That defendants concealed their conspiracy in this case cannot be disputed. Defendants never published the fact that Avis gave free cars and money to Mackell and his staff, or the fact that ITT gave Mackell a $180,000 "contribution" to a foundation set up expressly for him, or the fact that Mackell and Robertson met personally with Avis representatives before beginning the investigations of plaintiffs.

The web of intricate financial relationships between the ITT-Avis defendants and the Mackell defendants was not a matter of public record. Indeed, the relationships among the defendants had to be kept secret if defendants' conspiracy was to be effective.

Moreover, defendants actively and affirmatively protected their secret arrangement. They never published any information concerning their illicit dealings. In the press release issued upon plaintiffs' arrest, no mention was made of defendants' financial dealings or the personal involvement of Mackell and Robertson.

Indeed, once the facts started becoming known, defendants attempted to bribe plaintiffs to quash the investigations -- an affirmative, if unsuccessful, act designed to limit public disclosure and protect the secrecy of the defendants'

arrangement.

Finally, the very use of secret government investigatory processes for fraudulent purposes is an affirmative act of concealment tolling the statute of limitations. As the Fifth Circuit held in Crummer Company v. DuPont, 255 F. 2d 425,433 (5th Cir.), cert. denied, 358 U.S. 884 (1958), if defendants "secretly move under the guise and protection of the public interest and through the public authorities", the concealment doctrine applies.

Here, defendants did just that. They concealed their illicit purpose and arrangement by acting under the guise of a legitimate law-enforcement proceeding. This is the basic act of concealment of the defendants and it is sufficient to invoke the concealment doctrine.

2. Plaintiffs Acted With Due Diligence.

Plaintiffs also satisfy the second part of the Grinnell test -- ignorance of the basic facts through no fault of their own.

Defendants must concede that plaintiffs did not know of the intricate web of illicit financial relationships that formed the defendants' conspiracy prior to the May 1973 public hearings of the New York State Joint Legislative Committee on Crime. That these were not matters of public record, and that plaintiffs did not have access to defendants' records which

document these connections are undisputed.

Instead defendants argue that since that actual prosecution of plaintiffs was not concealed, plaintiffs were put on notice of defendants' conspiracy, but failed to exercise due diligence to ferret out the concealed facts that made the prosecution actionable.

This argument, however, conveniently ignores the fundamental elements of § 1983 action and disregards the practical legal problems faced by the plaintiffs prior to the public disclosure of defendants' conspiracy.

As this Court well knows, there are three basic elements to a civil rights action under § 1983 or the Constitution. To survive a motion to dismiss and obtain a verdict, a civil rights plaintiff must allege and ultimately prove that

1) his rights have been violated;

2) the defendants act under color of law; and

3) each official defendant personally participated in the violation of plaintiffs' rights.

See generally Rizzo v.Goode, 423 U. S. 362 (1976) and Adickes v. Kress & Co., 398 U.S. 144 (1970). Failure to demonstrate any one of these elements will cause the dismissal of plaintiffs' claim.

Defendants argue that since plaintiffs knew or should have known in 1971 and 1972 of facts sufficient to

establish the first element of such claim, they were put on notice to inquire into the factual basis of the other two elements but failed to do. This argument is faulty on several grounds.

First, whether plaintiffs were in fact on notice to inquire further is a factual question which cannot summarily be decided against plaintiffs on a motion to dismiss.* Since hindsight has demonstrated the illicit relationship between the Avis-ITT defendants and the Mackell defendants, defendants argue that plaintiffs in 1971 and 1972 should have assumed that the Queens County District Attorney's Office acted in violation of all standards of morality and decency and was prosecuting plaintiffs because it was paid to do so by Avis and ITT.

Perhaps in this post-Watergate period we automatically assume that all law enforcement officers are on the take. But whether the Court should require plaintiffs to have made such an assumption in 1971 and 1972 is dubious factually and contrary to the general legal proposition that governmental officials are presumed to be acting legitimately.

But even if plaintiffs had a duty to inquire, they could not have done any more than they did.

At their trial, plaintiffs moved to suppress the

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* On this motion, the Court must view the allegations in the complaint in the light most favorable to plaintiffs. Escalera v. New York City Housing Authority, 425 F. 2d 853, 861 (2d Cir.), cert. denied, 400 U.S. 855 (1970).

results of the raid on Sta-Brite, but no hearing was held on this motion because defendants told the trial court that no evidence would be introduced from the raid.* (Trial Transcript pp. 2-5) Plaintiffs moved to inspect the grand jury minutes, but that motion too was denied. (29A) Once the trial ended, after virtually no testimony, plaintiffs no longer had subpoena power to obtain defendants' records or depose witness. All their efforts post-trial to uncover defendants' conspiracy were unavailing until the May 1973 hearings.

Defendants, however, citing Mount v. Book-of-the-Month Club, Inc., No. 76-7458 (2d Cir., May 19, 1977) and Fitzgerald v. Seamans, 533 F. 2d 220 (D.C. Cir. 1977), argue that plaintiffs should have started a lawsuit against unspecified persons in 1971 or 1972 and used the discovery in that action to unravel the concealed conspiracy.

No such remedy, however, was available to plaintiffs. Until the public hearings, the plaintiffs did not know that ITT's and Avis' participation in the prosecution was not entirely innocent. Until the public hearings revealed that the Avis defendants financed the prosecution, plaintiffs could not demonstrate that the Avis defendants acted under color of law. Thus, no civil rights action against ITT and Avis would have survived a motion to dismiss. E.g., Estate of Iodice v. Gimbels, Inc., 416 F. Supp. 1054 (E.D.N.Y. 1976); Mullarkey v. Borglum, 323 F.Supp.1218 (S.D.N.Y. 1970).

* Indeed, since this representation by defendant McKeon to the criminal court served to conceal the relationship among the defendants, this representation is another affirmative act of concealment. cf. Fitzgerald v. Seamans, 553 F. 2d 220, 229 (D.C. Cir. 1977).

Similarly, an action against Mackell and Robertson would also have succumbed to such a motion because of plaintiffs' ignorance of these two defendants' personal involvement.

An action against the other officials was not a practical alternative. There is no indication in the record of their financial resources which would have made such a lawsuit worthwhile.

More importantly, these defendants claim absolute immunity from civil suit. They cannot therefore argue that plaintiffs should have sued them to learn of the facts of defendants' conspiracy when they at the same time argue that they are immune from suit.

Moreover, it is not good policy for this Court to suggest that plaintiffs "rush to litigation on bare suspicion that [governmental officials] acted in bad faith" to preserve the statute of limitations while the plaintiffs embark on discovery fishing expeditions. Fitzgerald v. Seamans, supra, 553 F. 2d at 228.

To penalize a plaintiff for failure to start a speculative lawsuit, when facts unknown at the time and solely within defendants' control later reveal the basis of a good lawsuit, will only encourage baseless and purely speculative litigation.*

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* It is also in conflict with Rule 11 of the Federal Rules of Civil Procedure which requires an attorney to certify that there is good grounds to support a pleading he files with the Court.

Thus, this case is distinguishable from Mount v. Book-of-the-Month Club, Inc., supra, and Fitzgerald v. Seamans, supra, relied on by defendants. In Mount, the plaintiff had available to him for many years enough evidence to bring a copyright infringement action which would have revealed the facts he claimed were concealed. Similarly in Fitzgerald, the plaintiff who had been dismissed from his job because of testimony he gave to Congress, started an administrative proceeding challenging his dismissal and knew from the Congressional and other investigations into his dismissal enough facts to assert a viable civil action for damages against most of the defendants he later sued. 553 F. 2d at 228-29.

Nonetheless, in one respect, this case is quite similar to Fitzgerald. In Fitzgerald the investigations in 1969 and 1970 revealed enough to put the plaintiff on notice that he had a damage action against all the defendants except one, a White House staff official. The first mention of White House involvement came in 1973 during the course of Civil Service Commission hearings.

Although the District of Columbia Circuit declined to apply the concealment doctrine to the defendants whose identities were revealed or suggested during the 1969 and 1970 investigations,

the Court did apply the doctrine to preserve plaintiff's action against the White House aide. The Court found that the earlier investigations had not revealed any White House involvement in plaintiff's dismissal.

Similarly, the illicit nature of the Avis and Mackell defendants' participation in the prosecution of plaintiffs was not revealed or intimated at until public hearings in May, 1973. Before the public hearings, there were no publicly available facts to put plaintiffs on notice that these defendants had acted in violation of Sec. 1983.

Any suspicion that may have existed prior to May, 1973, was purely speculative and plaintiffs were without the means to obtain the true facts. Thus, as in Fitzgerald, the concealment doctrine should apply to those defendants whose actionable involvement was not revealed until after May, 1973.

In Fitzgerald and in other cases, the courts have rejected defendants' argument that since plaintiffs may have been able to sue some of their prosecutors in 1971 and 1972, the the statute of limitations began running at that time with respect to all defendants. What little knowledge plaintiffs

may have had prior to May, 1973, was not sufficient to start the statute of limitations running against all the defendants in this action.

As the Fifth Circuit held in Crummer Company v. DuPont, supra, 255 F.2d at 431:

> "[The] cases do not stand for the general rule that if an injured party knows that two or more persons have injured him but only later learns that their actions, together with joint actions of several others amounted to a conspiracy between all of them, the statute commenced in all events to run from the acquisition of knowledge of the actions of the two." (Emphasis deleted)

The conspiracy charged in this complaint is one whose existence was concealed by defendants from the plaintiffs until May and October, 1973. Accordingly, under Fitzgerald and Crummer, the federal concealment doctrine tolled the running of the limitation period governing this action until May, 1973.

B. The Applicable Time Period is Three Years from Discovery, Not Two Years

If the federal concealment doctrine applies, this action is timely, having been commenced within three years after discovery of the underlying facts.

Defendants argue, and the court below held, however, that application of the concealment doctrine changes the applicable New York State statute of limitations from the three year statute normally applied to civil rights action, N.Y.C.P.L.R. 214(2), to the two years from discovery provision of N.Y.C.P.L.R. 203(f).

A good deal of defendants' argument on this issue is devoted to showing that § 203(f) is a statute of general applicability, and that it does not apply solely to fraud actions. The relevant question, however, is not whether § 203(f) admits of general application, but whether it applies to this case. Plaintiffs assert it does not.

The decisions of this Court and the Supreme Court have established a three-part test to determine whether an action to enforce a federally-created right is timely in the absence of a federal statute of limitations.

The first step is to find and apply the analogous state statute. If this does not make the action timely, the

court, under step two, then must determine whether any state tolling provisions apply to save the action. If not, the third step is to determine whether any federal tolling provisions make the suit timely.

1. The Applicable State Statute. All parties concede that under a long line of holdings of this Court, the applicable New York statute is the three year period of N.Y.C.P.L.R. 214(2) governing actions to recover on a liability created by statute, Kaiser v. Cahn, 510 F. 2d 282, 284 (2d Cir. 1974).*

2. New York State Tolling Provisions. Since this action was brought more than three years after the actionable events occurred, the court must determine whether any state tolling provisions apply. As the Supreme Court held in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-64 (1975), state tolling provisions are closely "interrelated" with the chronological period set forth in the statute.

As demonstrated in plaintiffs' main brief, no New York State tolling provision makes this action timely. New York has rejected an across-the-board application of the concealment doctrine. Under N.Y.C.P.L.R. 203(a) the limitations period in

*This Circuit, by implication, has previously rejected the suggestion newly made in the Mackell defendants' brief, (p.10), that the applicable state statute is the one-year period for malicious prosecution, N.Y.C.P.L.R. 215. See Regan v. Sullivan, No. 76-6139 (2d Cir., May 25, 1977).

New York starts running when the events occur, not when plaintiffs learn of them:

> "The time within which an action must be commenced, except as otherwise expressly prescribed, shall be computed from the time the cause of action accrued to the time the claim is interposed."

In the words of Dean McLaughlin,

> "This section [203(a)] states the general rule that the statute of limitations commences to run when the cause of action accrues, and that knowledge of the cause of action is not required...There are, to be sure, exceptions, but they are rare."

McLaughlin, Practice Commentary to § 203, 7B McKinney's Consolidated Laws of New York, at 111 (1972).

There are no exceptions, under New York law, which apply to this case. The three year period set forth in § 214(2) does not expressly provide that actions brought under it are to be measured from discovery. And there are no New York cases which apply a discovery provision to this type of action. Indeed, the New York cases cited by plaintiffs at page 23 of their main Brief, expressly decline to impose such a toll under § 214.

Thus under New York law, this action is untimely.

3. Federal Tolling Provisions. Since no state

tolling provisions apply, following this Court's rulings in Meyer v. Frank, 550 F. 2d 726 (2d Cir. 1977), and Kaiser v. Cahn, supra , the court must then determine if any federal tolls are available to plaintiffs to make their action timely.

As demonstrated above, the federal concealment doctrine does apply to this case. That doctrine tolls the running of the limitations period until plaintiffs' discovery of their claim in May 1973.

Thus, under this analysis, since the applicable state limitations period of three years did not start running, pursuant to the federal concealment doctrine, until May 1973, this action, which was commenced in April 1976, is timely.

This is the proper analysis of the statute of limitations question. Defendants and the court below, however, add a fourth step which is neither logical nor legal. They ask, is there a provision of state law which can be used to modify or limit any applicable federal tolling provision?

There is no logical reason why this fourth step should be added. Moreover, it directly conflicts with Johnson v. Railway Express Agency, Inc., supra; Meyer v. Frank, supra; and Kaiser v. Cahn, supra: These cases, and countless others, all hold that federal, not state, law is the final arbiter of the limitations period for the enforcement of federally-created rights.

In addition to violating the principle of federal supremacy set forth in the cases cited above, defendants' analysis conflicts with this Court's decision in Moviecolor Limited v. Eastman Kodak Company, 288 F. 2d 80 (2d Cir.), cert. denied, 368 U.S. 821 (1961), which mandates uniform application of the concealment doctrine to all plaintiffs enforcing federally-created rights.

As explained by Judge Friendly, once the courts or Congress have developed a federal doctrine which applies to all actions to enforce federally created rights, application of the federal doctrine should not be made dependent on where the plaintiff happens to reside. Thus, while in the absence of Congressional enactment the underlying limitations period may vary from state to state, under Moviecolor, the judicially established federal tolling provisions which modify the limitations period may not.

To hold otherwise, as noted, reverses the primacy of federal over state law in the enforcement of federally-created rights and destroys any notion of federally-created rights and remedies available to all persons wherever situated.

This reasoning is reinforced by the holding of Monroe v. Pape, 365 U.S. 167, 173, 174 (1964), that the purpose

of Sec. 1983 is to provide a federal remedy where the state remedy is either inadequate or unavailable. To allow state law, particularly when it is incorrectly applied, to limit the availability of the remedy provided by Sec. 1983 in this case is thus to undo the purpose for which the Civil Rights Act of 1871 was enacted.

Accordingly, under the holdings of the Supreme Court and this Circuit, the ruling below should be reversed.

## II. THE MACKELL DEFENDANTS ARE NOT ABSOLUTELY IMMUNE FROM LIABILITY

The Mackell defendants offer little in opposition to plaintiffs' arguments that the Mackell defendants are not absolutely immune from liability in this case.

Plaintiffs assert that when a prosecutor acts like a policeman -- when he performs investigatory rather than advocacy functions -- he should be liable like a policeman. Defendants offer nothing in response.

They cite no decisions of the Circuit or any other circuit which hold otherwise. And they offer no policy reasons why this Court should reject the holdings of the First, Fifth, Sixth, Seventh, Ninth and District of Columbia Circuits in support of plaintiffs' position (Plaintiffs' main Brief, pp. 33-38).

Rather, by plea of avoidance of plaintiffs' reasoning, the Mackell defendants argue that since their illegal conduct began with the service of a purported grand jury subpoena, they are exempt from liability. The grand jury subpoena, defendants assert, represents the initiation of criminal prosecutions, and is not merely investigation.

The argument does not withstand analysis.

First, it must be stressed that a "grand jury subpoena" allowing the server to take immediate possession of specified documents is illegal under New York State law, a fact omitted in the Attorney General's brief. Heisler v. Hynes, No. 418, (New York Court of Appeals, July 7, 1977); Interfaith Hospital v. People, 71 Misc. 2d 910, 337 N.Y.Supp.2d 358 (Sup. Ct. Queens Co. 1972); Gay Cottons, Inc. v. Hogan, 55 Misc. 2d 126, 284 N.Y.Supp. 2d 684 (Sup. Ct. N.Y.Co. 1967); Amalgamated Union, Local 224 v. Levine, 31 Misc. 2d 416, 219 N.Y.Supp.2d 851 (Sup. Ct. Nassau Co. 1961) (B. Meyer, J.). That the subpoena was endorsed by a New York State Supreme Court justice does not make the seizure of records any more valid. Interfaith Hospital v. People, supra.

Second, there is a world of difference between the investigation of criminal activity and the initiation of criminal proceedings. The "grand jury subpoena" was the former, not the

latter. No criminal proceedings were initiated against plaintiffs until after the "subpoena" was served and the cars and records confiscated (9a). Indeed, there is no indication in the record that a grand jury was in fact sitting at the time of the raid.

Third, the indictment that was eventually handed down had absolutely nothing to do with the prior raid. By defendants' own admission, no information obtained in the raid formed any part of the indictment and prosecution of plaintiffs* (25a; Trial Transcript, pp. 2-5).

The distinction asserted by the Mackell defendants does not hold. It may have been called a grand jury subpoena but the document defendants used to justify their raid on Sta- Brite was in fact a search warrant obtained without probable cause. It was not part of an already commenced criminal proceeding. No legitimate law enforcement activity would be compromised by holding prosecutors liable under the same standard as policemen for their participation in an illegal search and

---

*Moreover Mackell and Robertson met with Avis defendants and helped hatch this entire scheme many months before the indictment was filed (6a-7a).

seizure mission prior to indictment.

The defense of absolute immunity is not available to the Mackell defendants.

## CONCLUSION

What plaintiffs seek in this appeal is their day in court.

Entirely unexpected and unfounded, defendants' attack on plaintiffs was devastating, and plaintiffs have never fully recovered from the confusing and bewildering maelstrom into which they were thrust.

Defendants acted in secret. They now seek to use their own secrecy -- which is the cause of this action not having been brought sooner -- to prevent plaintiffs from finally obtaining relief from the havoc created by defendants.

Defendants should not be permitted to succeed in this final chapter of plaintiffs' saga. Not only would such a result be inconsistent with federal law, as demonstrated above, it would be grossly unfair -- both to the plaintiffs and to the purposes of Section 1983.

Congress enacted, and the courts have interpreted, the Civil Rights Act of 1871 to do justice --

to redress violations of rights and to punish wrongdoers.

Plaintiffs seek to undo the harm so cruelly inflicted upon them by defendants. Plaintiffs ask only for justice -- the opportunity to be heard before a fair and impartial tribunal, an opportunity they have so far been denied.

By law and by equity, this Court should grant their request and reverse the decision below.

Respectfully Submitted,

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Michael N. Pollet
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July 25, 1977

#6251

**Affidavit of Service by Mail**

In re:

Cestaro v Mackell

State of New York
County of New York, ss.:

Michael Lane,

being duly sworn, deposes and says, that he is over 18 years of age.

That on ....., 197..., he served copies of the within Brief in the above-named matter on the following counsel by enclosing said copies in a securely sealed postpaid wrapper addressed as follows:

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and depositing same in the official depository under the exclusive care and custody of the United States Post Office Department within the City of New York.

and depositing same at the Post Office located at Howard and Lafayette Streets, New York, N. Y. 10013.

Michael Lane

Sworn to before me this 25
day of July, 1977

Jack A. Messina

JACK A. MESSINA
Notary Public, State of New York
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Commission Expires March 30, 1979